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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944
NO. 464

INTERSTATE MOTOR FREIGHT SYSTEM,
a Michigan Corporation, Petitioner,

v.

MARY MATILDA DUBROCK, Surviving Wife of Levi Frederick Dubrock, Deceased, as Trustee for Herself and Her Five Minor Children, Margaret Dubrock, Mamie Dubrock, Calvin Dubrock, Richard Dubrock and Gerald Dubrock, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the judgment in favor of the Respondent be set aside and judgment entered in accordance with the Petitioner's motion for a directed verdict where the Respondent's evidence shows that Respondent's deceased husband, in the afternoon of a clear day, was operating an automobile at the rate of twenty miles per hour in an easterly direction in the center lane of a three-lane highway and approaching an intersecting highway into which he intended to make a left turn,

after presumably having signalled his intention, and that the truck of the Petitioner, travelling in a westerly direction at forty miles per hour, when about one hundred feet from the Respondent's deceased husband's automobile, which was then occupied by the Respondent's deceased husband, who in attempting to avoid a collision, turned his automobile back toward his right of the highway and a head-on collision occurred, approximately in the middle lane of the highway?

2. Is the Petitioner entitled to a new trial where the Trial Judge refused to charge the jury as requested by the Petitioner that the Respondent could not recover if her husband's negligence was the proximate cause of the accident when the judge had in his general charge instructed the jury that Respondent could not recover if her deceased husband was negligent in any manner?

3. Is the Petitioner entitled to a new trial by reason of the Trial Court's charge to the jury that if Respondent's husband gave sufficient warning of intention to turn left into an intersecting road, the duty rested upon the driver of the truck to bring his truck to a stop, under the laws of Pennsylvania, where the undisputed evidence shows that the Respondent's deceased husband entered the intersection and had a right of way therein and that had the truck stopped and yielded the intersection to the decedent's car, the collision would not have occurred?

II.

COUNTER-STATEMENT OF THE CASE

The Respondent agrees with the facts set forth in the Petition for a Writ of *Certiorari* under the heading of "Statement" (pages 3 to 5), with the exception of the following:

The statement that Dubrock was turning to his left is an incorrect statement of the facts. The eye witnesses to the accident testified that Dubrock was travelling in the center lane of the highway and there was no testimony that he had commenced to make a left turn. The driver of the Petitioner's truck did not testify.

There are no questions presented by the facts and decision in this case that bring it within the provisions of Section 240 of the Judicial Code as amended, and within the provisions of Rule 38-5(b) of this Court. The decision of the Circuit Court of Appeals follows the decisions of this Court, of other Circuit Courts of Appeal and of the Circuit Court of Appeals for the Third Circuit.

1. The first of the three questions raised by the Petitioner is based upon an erroneous interpretation of the facts in the case. There was no evidence that the proximate cause of the accident was the operation of the Dubrock car. The case of *Atlantic Coast Line Railroad v. Driggers,* 279 U. S. 787, is not in point, since there is no similarity between that case and the case at bar.

2. The second question raised by the Petitioner is the failure of the Trial Judge to charge the jury in accordance with the request of the Petitioner, which request the Trial Judge properly refused because the re-

quested charge was not a correct statement of the law. The charge requested is as follows:

> "If the proximate cause of this accident was the deceased turning back toward the right side of the road when the truck had made its turn to pass behind it, then your verdict must be for the defendant."

The Trial Judge properly stated the law to the jury in his instructions, which were approved by the Circuit Court of Appeals for the Third Circuit. The portion of the charge covering this point is as follows:

> "If the truck driver was negligent and the collision resulted from the negligence of the truck driver, and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case."

Under Pennsylvania law, the Respondent would be barred from a recovery if the deceased (Dubrock) was guilty of any negligence, whether his negligence was the proximate cause of the accident or not. In addition to covering the matters requested by the Petitioner, the Trial Judge, in his charge, instructed the jury that in order for the Respondent to recover, it was necessary for her to show that the collision, resulting in the death of her husband, was due solely to the negligence of the driver of the Petitioner's truck. The portion of the charge covering this point is as follows:

> "Now, you have to judge what that situation was, who was to blame for that accident. Should the truck driver have gone farther out around when he saw the other man was going to make a turn? Should he have had his truck sufficiently under control so he could have stopped and let the other man

go by? That is for your consideration. If Dubrock, having once committed himself to the turn, made a turn to the right again, you will have to say whether that would be an act of contributory negligence on his part which would prevent his widow and his children to recover any damages they may suffer by reason of his death. Those are in main the issues of fact as to the negligence. That is the first question you will have to decide.

"*If the truck driver was negligent and the collision resulted from the negligence of the truck driver,* (emphasis supplied) and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case, your verdict should be for the plaintiff. If, on the other hand, there was any act on the part of Dubrock himself which contributed to this accident, which would not have happened had he acted otherwise in view of all the circumstances of the case, then he could be concluded to be guilty of contributory negligence and there could be no recovery in this case at all."

The principles enunciated in the *Milwaukee and Saint Paul Railway Company v. Kellogg,* 94 U. S. 469 (1876), *Atlantic Coast Line Railroad Company v. Driggers, supra,* and *Warren v. Haines,* 126 Fed (2d) 161, were followed by the Trial Judge in the portion of his charge set forth above.

3. The third question raised by the Petitioner is the interpretation of the statute of the Commonwealth of Pennsylvania, relating to the duty of drivers at an intersection. The Trial Judge correctly charged the jury on this subject as follows:

"If he gave a sufficient warning of his intention to turn into that road, then the duty would have rested with the driver of the truck to have brought his truck to a stop, so that Dubrock would have made his lefthand turn into this intersecting road. Dubrock being dead, there would be a presumption that he took the necessary precautions that he should have taken in order to make that lefthand turn."

III.

ARGUMENT

The Decision in This Case That It Was a Question of Fact for the Jury as to Whether There Was Negligence or Contributory Negligence Is Not in Conflict With Other Circuit Courts of Appeal and With Decisions of This Court.

The questions of fact involved in this case are very simple and undisputed.

The Respondent's deceased husband was driving his car in an easterly direction on a three-lane highway approaching an intersecting highway. He was travelling at a rate of speed of twenty miles per hour and had moved from the South lane of the highway in order to make this turn. It can be inferred from what followed that he had signalled his intention of making a left turn off the highway. The Petitioner's truck was travelling in the North lane of the highway in a westerly direction at a rate of speed of forty miles per hour, which is in excess of the legal speed limit for such vehicles in the Commonwealth of Pennsylvania, *Act of May 1, 1919, P. L. 905, Art. X, Sec. 1002, 75 P. S. 501.* Petitioner's truck

was out of control when its driver observed the Respondent's deceased husband's car, and upon reaching a point approximately one hundred feet from the Respondent's deceased husband's car, it swerved to its left into the center lane of the highway, which was then occupied by the Respondent's deceased husband's car. This created an emergency. The Respondent's deceased husband took the only course open to him; that of trying to avoid a collision by turning to his right and clearing the path for the oncoming truck, although he had the right of way in the intersection and should have been allowed by the Petitioner's truck to safely negotiate a left turn off the highway. He did not succeed in getting out of the center lane of the highway in time to avoid the truck and the collision occurred in the center lane of the highway. This testimony was given by two disinterested witnesses who were standing opposite the point of collision. The only other witness to the accident was the driver of the Petitioner's truck, who was not called as a witness by the Petitioners. After the collision, the truck travelled three hundred and ninety-five feet from the point of collision and threw the Respondent's deceased husband's car one hundred ninety-eight feet from the point of the impact. This testimony was given by Anthony Kaleita, a member of the Pennsylvania Motor Police, who arrived at the scene of the accident immediately after the collision and took measurements of the skid marks and distances the cars had travelled.

There was clear evidence of negligence on the part of the driver of the Petitioner's truck. There was no evidence of negligence on the part of the Respondent's deceased husband. Whether the driver of the Peti-

tioner's truck was negligent or whether the Respondent's deceased husband was negligent was a question of fact for the jury and the submission of that question of fact to the jury was not in conflict with the decisions of the Circuit Courts of Appeal or of this court.

There was no definite evidence that the deceased was in any way negligent under the circumstances. Therefore, there is a presumption that he was not negligent.

Miller v. Union Pacific Railroad Co., 290 U. S. 227, page 233:

> "If, as here, there be no evidence which speaks one way or the other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. Looney v. Metropolitan R. Co., 200 U. S. 480, 488."

The cases cited in Petitioner's Argument, *Rich v. Chicago M. & St. P. Ry. Co.,* 149 Federal Reporter 79; *Tomlinson v. Chicago, etc., Ry. Co.,* 67 C. C. A. 218, 134 Fed. 233, 234; *Rollins v. Chicago, etc., Ry. Co.,* 71 C. C. A. 615, 139 Fed. 639; *Wabash R. Co. v. De Tar,* 73 C. C. A., 166, 141 Fed. 932, 934, are not in point for the reason that in all of the aforementioned cases, there was clear evidence of negligence on the part of the plaintiffs.

In the case at bar, Respondent's deceased husband, travelling at a low rate of speed had moved from the South lane of traffic to the center lane of traffic, as required by the statutes of the Commonwealth of Pennsylvania, and was in the center lane of the highway at the time the collision occurred. Had the Petitioner's truck been under control on its right side of the high-

way, as required by the statutes of the Commonwealth of Pennsylvania, and travelling at a legal rate of speed, the collision would never have occurred.

The action of the driver of the Petitioner's truck would lead any reasonable person to believe that the deceased driver had given a hand signal of his intention to make a left turn into the intersecting highway, thereby supporting the legal presumption that he had used due care. This presumption was not rebutted by any testimony. The failure of Petitioner to put the truck driver on the stand supports the conclusion that the driver's testimony, if given, would show no negligence on the part of the decedent.

The cases cited by the Petitioner in its brief, (pages 18 to 20) are not in point, since the fact situation in those cases are not at all similar to the fact situation in the case at bar.

The Decision of the Circuit Court That the Trial Judge's Charge Covered the Doctrine of Proximate Cause Is Not in Conflict With the Decisions of This Court and Other Circuit Courts of Appeal.

The Petitioner requested the Trial Judge to charge as follows:

> "If the proximate cause of the accident was the deceased turning back toward the right side of the road when the truck had made its turn to pass behind, then your verdict must be for the defendant."

The Trial Judge properly refused this request, inasmuch as it is not a correct statement of the law.

Had the Respondent's deceased husband been guilty of any negligence, that negligence would have been a bar to recovery.

As stated by Judge Kalodner, in his opinion (R. 67):

> "It is difficult to see just how this request would benefit defendant, and, under the Pennsylvania rule, in order to defeat recovery on the ground of contributory negligence, it is not necessary that the negligence be *the* proximate cause, but it is enough if it so contributed to the accident that without it the accident would not have occurred."

The Petitioner did not make a specific request of the Court to charge the jury that the negligence of the driver of the Petitioner's truck must be the proximate cause of the accident for the reason that the Trial Judge had covered that point in his charge: (R. 58)

> "Now, you have to judge what that situation was, who was to blame for that accident. Should the truck driver have gone farther out around when he saw the other man was going to make a turn? Should he have had his truck sufficiently under control so he could have stopped and let the other man go by? That is for your consideration. If Dubrock, having once committed himself to the turn, made a turn to the right again, you will have to say whether that would be an act of contributory negligence on his part which would prevent his widow and his children to recover any damages they may suffer by reason of his death. Those are in main the issues of fact as to the negligence. That is the first question you will have to decide.

"*If the truck driver was negligent and the collision resulted from the negligence of the truck driver,* (emphasis supplied) and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case, your verdict should be for the plaintiff. If, on the other hand, there was any act on the part of Dubrock himself which contributed to this accident, which would not have happened had he acted otherwise in view of all the circumstances of the case, then he could be concluded to be guilty of contributory negligence and there could be no recovery in this case at all."

The Trial Judge's charge followed the principles of the law laid down in the cases cited in the Petitioner's brief, pages 23 and 24. The jury was clearly charged that in order for Respondent to recover, they must find that the negligence of the Petitioner's truck driver was the cause of the collision. This thoroughly covered the question of proximate cause, and the Petitioner does not and could not complain that the charge on contributory negligence was not adequate.

The Decision in This Case With Regard to the Duty of the Driver of the Truck to Stop Is Not in Conflict With the Statute of Pennsylvania.

The statute setting forth the manner in which a vehicle may make a left turn is as follows:

Act of 1925, P. L. 905, Article 1013.

"(b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such

first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act."

The decedent had entered the intersection after having presumably signalled his intention of making a left turn. Under these circumstances, it was the duty of the driver of the Petitioner's truck to bring his truck to a stop, since it was not possible for him to yield the right of way to the decedent, unless his truck was brought to a stop. The Judge properly charged, under the facts presented, that the law required the driver of the truck to bring his truck to a stop, so that the decedent could safely negotiate a left turn off the highway. Had the Petitioner's truck yielded the right of way to the decedent at the intersection, as required by the statute, the collision would not have occurred.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals does not conflict with the decisions of this Court or with the decisions of the Circuit Court of Appeals for the Third Circuit and other Circuit Courts of Appeal, and does not present important questions of the law requiring the decision of this Court and it is respectfully submitted that the Petition for a Writ of Certiorari should be dismissed.

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